JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
12 May 1998 *

(Officials – Annulment of the decision rejecting the applicant's candidature for the post of assistant to the Deputy Director of the ITER joint work site at Naka, Japan – Offer of the post – Breach of the agreement – Claim for damages)

In Case T-184/94,

Martin O'Casey, a member of the temporary staff of the JET Joint Undertaking, represented by Georges Vandersanden, of the Brussels Bar, assisted by Teertha Gupta, Barrister, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 30 Rue de Cessange,

applicant,

v

Commission of the European Communities, represented by Ana Maria Alves Vieira and Richard Lyal, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the letter from the Deputy Director of the International Thermonuclear Experimental Reactor and head of the joint work site at Naka, Japan, of 16 July 1993 informing the applicant that his candidature for the post of administrative assistant to the said Deputy Director was rejected and of the

* Language of the case: English.

decision contained in that letter to reject his candidature, and for damages to compensate for the material and non-material harm thus suffered by the applicant,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: J. Azizi, President, R. García-Valdecasas and M. Jaeger, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 6 November 1997,

gives the following

Judgment

I – Legislative Background

1 By Decision 92/439/Euratom of 22 April 1992, the Commission of the European Communities concluded for and on behalf of the European Atomic Energy Community ('the Community'), on the basis of Article 101 of the Treaty establishing the European Atomic Energy Community ('the EAEC Treaty'), an agreement with the Government of Japan, the Government of the Russian Federation and the Government of the United States of America on cooperation in the engineering design activities for the International Thermonuclear Experimental Reactor ('ITER') (OJ 1992 L 244, p. 13).

2 The purpose of the cooperation agreement, signed at Washington on 21 July 1992 (OJ 1992 L 244, p. 14), is to conduct jointly the activities to produce a detailed, complete and fully integrated design for the ITER reactor and all technical data necessary for future decisions on its construction. The design and technical data are then to be available for each of the parties to use either as part of an international collaborative programme or in its own domestic programme (Article 1 of the agreement).

3 To achieve that purpose, the cooperation agreement provides for a Council to be established with responsibility for the overall direction of the project (Article 4). The Council is to appoint a Director, who is to direct and coordinate, *inter alia*, the performance of the research activities and who, in carrying out his duties and responsibilities, is to act independently and neither seek nor take instructions from any party (Article 5).

4 To assist the Director in the performance of his duties (Article 8(3)), the agreement further provides for the establishment of a Joint Central Team consisting of four Deputy Directors, an administrative officer and a head for each joint work site, and other members (Article 8(2)).

5 The four Deputy Directors, one from each party, are to be appointed by the Council, upon proposal by the parties and in consultation with the Director (second sentence of Article 8(2)).

6 The administrative officer and head for each joint work site are to be appointed by the Council, upon proposal of the Director acting in consultation with the parties. They may be chosen from among the Deputy Directors (third sentence of Article 8(2)).

7 Other members of the Joint Central Team are to be chosen by the Director from among qualified persons nominated by the parties (fourth sentence of Article 8(2)).

8 The parties agree to make qualified persons available to the Joint Central Team in approximately equal numbers, by secondment agreements or by other means specified in the protocols to the cooperation agreement (first sentence of Article 8(2)).

9 It is agreed that seconded personnel are to remain employees of their existing employers, that the contracts of employment between the seconded personnel and their employers are to subsist during the secondment, and that the employer is to continue to pay its seconded personnel their salaries and other related expenditure, insure them against accidents and, with regard to the careers of its seconded personnel, give due consideration to their performance during the secondment (Appendix to Protocol 1 to the cooperation agreement, OJ 1992 L 244, p. 27).

10 The Joint Central Team is located at the joint work sites, which are Garching (Germany), Naka (Japan) and San Diego (United States of America) (Article 13 of the cooperation agreement).

11 The negotiators agreed on the names of the parties' likely nominees for the most important positions. Nominees from the Community were to occupy *inter alia* the post of Director (Dr Rebut) and one of the four posts of Deputy Director, the holder of which would also be head of the joint work centre at Naka (Dr Huguet). The Community would additionally be represented on the Council by Mr Maisonnier, the Director of the Fusion Programme in Directorate-General XII of the Commission ('DG XII') (Understandings annexed to the cooperation agreement, OJ 1992 L 244, p. 29).

II – Facts of the case

12 The applicant, Martin O'Casey, is a member of the temporary staff in Grade A 4 at the Joint European Torus Joint Undertaking ('JET'), in England, where he has worked since 1 May 1980 as an administrator in the contracts service.

13 According to the applicant, in early April 1992 Dr Huguet, Associate Director of JET, who had been nominated as Deputy Director of ITER and head of the joint work site at Naka, Japan, asked him if he would agree to become his administrative assistant in the new duties he was to take up in Japan from September or October 1992. He agreed to consider the offer.

14 The applicant states that in the afternoon of 30 April 1992 he had a further discussion with Dr Huguet about the offer. On his asking about the grading of the post to be filled and the educational facilities available for his children at Naka, Dr Huguet reassured him and then asked him to give his decision. In view of the assurances with which he had been provided, the applicant stated that he would be pleased to accept the post offered.

15 It was understood that the post would have to be allocated by DG XII and that the applicant would have to attend for interview in due course.

16 The applicant also states that towards the middle of June 1992 he again met Dr Huguet to ask what progress had been made in DG XII regarding the decision to allocate the post and its advertisement. Dr Huguet confirmed that he was empowered to offer him the post and that his choice could not be overruled. In view of those assurances, the applicant, as requested by Dr Huguet, confirmed his acceptance of the offer.

17 The applicant adds that, on a visit to JET in January 1993, Dr Huguet met him again and assured him that he needed his services in Japan more than ever.

18 In February 1993 the vacancy notice for the post of administrative assistant to the Deputy Director and head of the Naka joint work site was published (COM/R5043/93). The notice stated that the holder of the post would be responsible for providing advice and support to the Deputy Director and head of the joint work site on administrative matters concerning ITER activities. It was also specified that familiarity with the administration of large research projects and with the Commission's administrative procedures would be desirable. A good knowledge of English and French was required.

19 According to the applicant, that description of the post bore hardly any resemblance to that originally drawn up by Dr Huguet.

20 The applicant applied and received an acknowledgment slip.

21 The applicant states that in May 1993 he learnt from a person working at the Naka joint work site that the post in question had been offered to Mrs Z., who worked in DG XIII. He later found out that she had refused the offer.

22 He states that he also learnt that defamatory rumours were circulating that he had received a 'demerit', that he had performed badly at the job interview for the post he was seeking, that he had been blacklisted in DG XII with regard to appointments and that he had said or written something offensive to Mr Maisonnier, the Director of the Fusion Programme in DG XII and a member of the ITER Council.

23 The applicant wrote to Dr Huguet at Naka on 10 May, 9 June and 9 July 1993, asking for information. Dr Huguet replied on 16 July 1993 by a letter printed on official ITER headed paper, in the following terms:

'Dear Martin,

I feel sorry for the difficulties the Naka administrator job seems to have produced for you.

The situation of the job has remained uncertain for a long time but is now clarified. The job is expected to be filled by a US candidate.

I hope you will be able to settle your dispute with the Commission.

Best regards,

M. Huguet.'

24 The applicant sent letters to DG XII on 9 June, 30 June and 2 August 1993, expressing his comments and concerns about the appointment procedure for the post in question. He received no reply before initiating the pre-litigation procedure.

III – Pre-litigation procedure

25 On 10 September 1993 the applicant lodged a complaint pursuant to Article 90(2) of the Staff Regulations of Officials of the European Communities in which he contested the decision, brought to his attention by Dr Huguet's letter of 16 July 1993, to exclude him from competition COM/R5043/93 and sought compensation for the harm he had thus suffered.

26 By letter of 13 September 1993 the Commission informed the applicant that competition COM/R5043/93 was still in progress and that he would be informed of its outcome.

27 On 27 September 1993 Dr Huguet wrote to DG XII to put his point of view on the applicant's complaint:

'I wish to clarify certain points relating to Mr O'Casey's complaint and the ITER recruitment procedure.

1. My conversations with Mr O'Casey about a post as administrator at Naka were exploratory discussions. Mr O'Casey was a suitable candidate for the post. I had similar discussions at the time with other European candidates for other positions.

2. No promise of employment was made to Mr O'Casey or to other candidates. I do not have authority to recruit Commission staff. In all cases I indicated that recruitment for ITER was subject to the rules of the Commission and would be from candidates selected by the Commission.

3. The recruitment procedures for the ITER Central Team are the same for European, American, Japanese and Russian applicants. ITER staff are chosen from the candidates proposed by the "parties", that is to say, the parties to the ITER Agreement.

I hope that this letter clarifies certain aspects of Mr O'Casey's complaint.'

28 On 27 September 1993 Dr Huguet informed Mr Maisonnier that a candidate from the United States of America had been selected for the post of administrator of the ITER joint work site at Naka, so that the post was no longer open to candidates from the Community.

29 On 18 November 1993 the applicant was given that information orally by a Commission official during an interservices meeting.

30 On 22 November 1993 the Commission withdrew vacancy notice COM/R5043/93.

31 On 8 December 1993, further to the meeting of 18 November 1993, the applicant sent the Commission a letter containing additional information in support of his complaint.

32 On 15 December 1993 the Commission informed the applicant that, because of the end-of-year holidays and in order to meet the time-limit for responding to a complaint laid down by the Staff Regulations, a draft reply had already been prepared prior to receipt of his letter of 8 December 1993.

33 The Commission rejected the applicant's complaint by a decision of 17 December 1993. He was notified of that decision by a letter dated 14 January 1994 for which he signed an acknowledgment of receipt on 7 February 1994. In the decision the Commission stated in particular that:

- it did not consider itself competent to express an opinion on the appointment made to post COM/R5043/93;

- it did not consider that it had been in a position before the date of the applicant's complaint to inform him of the final outcome of the selection procedure for the post in question and of the reasons for the rejection of his candidature; and

- it considered that there had been no irregularity in the selection procedure to the applicant's detriment and that there was no causal link between the defamatory rumours referred to by him and the decision taken by ITER's officers not to accept his candidature; hence the Commission could not be held liable.

IV – Procedure and forms of order sought

34 Those were the circumstances in which the applicant, by application lodged at the Registry of the Court of First Instance on 3 May 1994, brought this action.

35 The applicant claims that the Court should:

– annul Dr Huguet's letter of 16 July 1993 informing the applicant that his candidature for the post of administrative assistant to the Deputy Director of the ITER joint work site at Naka, Japan, was rejected;

– order the Commission to pay the applicant sums provisionally estimated at £360 000 and £100 000 as compensation for material and non-material damage respectively; and

– order the Commission to pay the costs.

36 The Commission, by pleadings lodged at the Court Registry on 14 July 1994, raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure, in which it contended that the Court should:

– dismiss the action as inadmissible; and

– make an order for costs in accordance with Article 88 of the Rules of Procedure.

37 By order of 12 July 1995 the Court reserved the decision on the objection of inadmissibility and on costs for the final judgment.

38 As a measure of organisation of procedure, the Court requested the Commission to answer various questions, which it did in its defence.

39 In the defence the Commission supplemented the submissions it had made in its objection of inadmissibility and asked the Court to:

– dismiss the action as inadmissible;

– in the alternative, dismiss the action as unfounded; and

– make an order for costs in accordance with Article 88 of the Rules of Procedure.

40 The parties presented oral argument and answered questions put orally by the Court at the hearing which took place on 6 November 1997.

Admissibility

Admissibility of the claim for annulment

Arguments of the parties

41 The *Commission* takes the view that the claim for annulment is inadmissible.

42 It contends, first, that the letter of 16 July 1993 from Dr Huguet does not constitute an act adversely affecting the applicant.

43 In that letter Dr Huguet was not speaking on behalf of the Commission, or even on behalf of ITER. Its purpose was not to inform the applicant of the rejection of his candidature but of the probable outcome of a selection procedure which had not yet come to an end when it was written.

44 Nor can the letter be construed as proof of a definitive decision not to appoint the applicant.

45 The Commission contends, secondly, that neither Dr Huguet's letter of 16 July 1993 nor any decision which it might reflect is an act for which the Commission can be held responsible.

46 In so far as there was a decision – to appoint a person other than the applicant to the post of assistant to Dr Huguet – it was a decision adopted not by the Commission but by ITER. The selection of staff for posts on the ITER Joint Central Team falls within the decision-making power of the Director of ITER, over which the Commission has no control. In any event, the Commission never took a decision to reject the applicant's candidature.

47 The Court has no jurisdiction to review such a decision. Even if it had, the action should not then have been brought against the Commission.

48 The *applicant* considers first of all that Dr Huguet's letter of 16 July 1993 contains a clear and unconditional statement that the applicant's candidature was rejected. The only uncertainty relates to the identity of the person to whom the post was to be given, which is of no concern to the applicant. It follows that the letter constitutes a legal act producing legal effects for the applicant.

49 The applicant refers in that regard to a judgment of the Court of Justice holding that an action challenging a communication from the administration which is merely an act preparatory to a subsequent decision by the appointing authority is admissible where its content and the nature of its source are such that it may be objectively considered as constituting a final decision taken by the appropriate administrative authority (Joined Cases 161/80 and 162/80 *Carbognani and Another* v *Commission* [1981] ECR 543). He also refers to a judgment of the Court of First Instance

holding that an official may bring an action against a list of officials found to be most deserving of promotion when his name does not appear on that list because, even if that list is not the final one, there is no real chance for the official in question of being promoted (Case T-82/89 *Marcato* v *Commission* [1990] ECR II-735, paragraph 52). He concludes that an action brought against an act which is only preparatory is admissible if it appears clearly from that act that a negative decision has been taken against an official and that that decision cannot be amended.

50 The applicant observes that if he had not contested the decision contained in Dr Huguet's letter of 16 July 1993 he would not have been able to bring an action. Despite his continued and repeated efforts he received no information from the Commission on the outcome of the competition procedure or the rejection of his candidature. The Commission cannot be entitled to benefit from its own negligence, namely its failure to inform the applicant of the result of the competition procedure or the rejection of his candidature.

51 The applicant then explains that Dr Huguet had authority to make the agreement with him from which he concludes, in substance, that the breach, evidenced in Dr Huguet's letter of 16 July 1993, of the validly concluded agreement was an act adversely affecting him.

52 The applicant further argues that the Commission may be held responsible for that breach of the agreement. The Commission has some control over the selection of Community staff for ITER posts. Since the Commission organised a selection procedure by publishing notice of competition COM/R5043/93, it was obliged to inform candidates of the results of the procedure and to reply to their reasonable questions during it. Moreover, the Commission is obliged, because of its duty to have regard to the interests of its staff, to ensure that ITER treats applicants correctly and fairly, that the appropriate administrative standards required within the Community are applied, and that it exercises sufficient control to protest against any irregularity on the part of ITER.

53 The applicant considers that his exclusion is explained by an improper intervention by Dr Rebut, formerly Director of JET and subsequently Director of ITER. In 1992 Dr Rebut interfered in an inappropriate manner with the operation of the promotion review panel in JET, when the promotion panel had placed the applicant ahead of a candidate recommended for promotion by Dr Rebut. Dr Rebut was the appointing authority for JET and as such refused to sign the amendment to the applicant's contract giving effect to his promotion from Grade A 5 to Grade A 4. It was only after an exchange of correspondence in 1993 between the Director-General of DG IX and the new Director of JET that the question was resolved to the applicant's satisfaction. The applicant was concerned, and obtained assurances from Dr Huguet relating to the possible difficulties which Dr Rebut might make in order to prevent his appointment.

54 Finally, the applicant adds in essence that if Dr Huguet did not have authority to make the agreement with him that agreement is nevertheless attributable to the Commission, so that its breach may be held against the Commission, even if the rejection of his candidature was solely the act of Dr Huguet, not the Commission. Dr Huguet held himself out as entitled to conclude agreements and make commitments at the behest of the Commission. He was and is an agent of the Commission in his duties at JET and ITER, which are closely connected to each other. He was not employed by ITER, which moreover does not have legal personality. It makes no sense to claim that Dr Huguet, even while occupying the position of Deputy Director of ITER, cannot act in any respect as the authorised agent of the Commission.

55 The applicant considers that the fact that an agent of the Commission concluded an agreement with him on the basis of which he acted in good faith constitutes an act adversely affecting him, particularly since he suffered material and non-material damage because of the breach of that agreement.

Findings of the Court

56 First of all, the Court has jurisdiction, under Article 152 of the EAEC Treaty and Article 3(1)(a) of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), last amended by Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment. It is settled case-law (see, for example, the judgment in Joined Cases 271/83, 15/84, 36/84, 113/84, 158/84, 203/84 and 13/85 *Ainsworth* v *Commission and Council* [1987] ECR 167, paragraph 12, and the order in Case T-177/94 *Altmann and Others* v *Commission* [1994] ECR II-1245, paragraph 35) that Article 152 of the EAEC Treaty must be interpreted as applying not only to persons who have the status of officials or of servants other than local staff but also to persons claiming that status.

57 It is therefore necessary to determine to what extent a case in which the applicant claims the status of Community servant with ITER concerns the Community and is covered by Article 152 of the EAEC Treaty.

58 The post at issue in these proceedings is among those on the ITER Joint Central Team. Under the fourth sentence of Article 8(2) of the cooperation agreement (referred to in paragraph 7 above), its holder is to be chosen by the Director of ITER from among qualified persons nominated by the Contracting Parties. As is made clear by Article 5(3), the Director of ITER, in carrying out his duties and responsibilities, is to act independently and neither seek nor take instructions from any of those parties.

59 It follows that the procedure for making an appointment to the post at issue involves two successive independent stages and that the parties to the ITER agreement, including the Community, play a part only in the first of those stages, not the second. In the first, shortlisting, stage the parties nominate persons qualified for the post in question for consideration by the Director of ITER. In the second,

appointment, stage the Director of ITER, acting independently, selects the holder of the post from the qualified persons nominated by the parties.

60 The Court has jurisdiction to hear actions relating to the first of those stages if it is vitiated by a defect for which the Community may be held responsible, in particular that of wrongly considering an internal candidature to be unsuitable and therefore wrongly failing to pass it on to the Director of ITER. The Court lacks jurisdiction, on the other hand, over the second of those stages. The Community takes no part in the decision by which the Director of ITER selects, from the qualified persons nominated by the parties, the candidate who is to take up the post, since ITER is a body under international law distinct from the Community.

61 Contrary to the applicant's submissions, ITER's position differs in this regard from that of JET. First, ITER is not, as JET is, a Joint Undertaking governed by Articles 45 to 51 of the EAEC Treaty, but a structure resulting from an international agreement concluded between the Community and the Governments of Japan, the Russian Federation and the United States of America pursuant to Article 101 of the EAEC Treaty. Therefore, unlike JET, which is a Community project (Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 81), ITER is an international project and not specifically a Community one. Secondly, the Commission confirmed in reply to a question put by the Court at the hearing that the Director of ITER, unlike the Director of JET (see *Ainsworth* v *Commission and Council* (referred to above in paragraph 56), paragraph 11), has not been delegated by the Community the power, conferred by the Staff Regulations on the appointing authority, to enter into contracts of employment for candidates nominated by the Community and selected by him.

62 That conclusion is not called into question by the fact that under the Appendix to Protocol No 1 to the cooperation agreement (referred to above in paragraph 9) the person selected by the Director of ITER for the post at issue, while seconded by the party which put him forward, remains employed by that party, nor by the fact that ITER lacks a legal personality which is legally separate from those of the parties which set it up. When the Director of ITER, acting independently, appoints, from among the qualified persons nominated by the parties, the person who is to hold the

post at issue, he is neither a Community organ nor, *a fortiori*, an appointing authority of a Community institution. His task is not restricted to choosing solely from among the candidates nominated by the Community but is to make that choice from among the candidates nominated by the four parties. Review by the Court of that choice would require the merits of candidates nominated by parties other than the Community to be assessed, which would clearly exceed the Court's jurisdiction.

63 Secondly, the existence of an act adversely affecting the official concerned within the meaning of Articles 90(2) and 91(1) of the Staff Regulations is an essential condition for the admissibility of any action brought by officials or other servants against the institution by which they are employed (Case T-20/92 *Moat* v *Commission* [1993] ECR II-799, paragraph 39, and Case T-196/95 *H* v *Commission* [1997] ECR-SC II-403, paragraph 44). Only acts producing binding legal consequences which directly and immediately affect the applicant's interests by significantly changing his legal situation may be the subject of an action for annulment (Case T-586/93 *Kotzonis* v *ESC* [1995] ECR II-665, paragraph 28, and *H* v *Commission*, cited above, paragraph 45). Such acts must issue from the appointing authority and must contain a decision (orders in Case T-34/91 *Whitehead* v *Commission* [1992] ECR II-1723, paragraph 21, and in Case T-26/96 *Lopes* v *Court of Justice* [1996] ECR-SC II-1357, paragraph 19).

64 The subject-matter of the claim for annulment must be established in accordance with those principles.

65 The application makes it clear that the action has the purpose of obtaining an order annulling 'Dr Huguet's letter of 16 July 1993 informing the applicant that his application to the post of administrative assistant of the Deputy Director for the ITER [Joint Work Centre] at Naka, Japan, was rejected'. That wording is repeated in the reply.

66 While the form of order sought must be set out precisely and unequivocally, the Court of Justice nevertheless accepts that claims may be implicit in the application (see, for example, the judgment in Case 8/56 *ALMA* v *High Authority* [1957] ECR 95, in particular at p. 100, and the order in Case C-388/93 *PIA HiFi* v *Commission* [1994] ECR I-387, paragraph 10).

67 In this case, the applicant sought in paragraph 19 of the application, under the heading 'As to the substance of the application', 'the annulment of the Commission's decision to reject Mr O'Casey's application to the post of administrative assistant at Naka, as contained in Mr Huguet's telefax of 16 July 1993'. The applicant stated in his complaint pursuant to Article 90 of the Staff Regulations: 'Effectively, I have been excluded from COM/R5043/93. In the particular circumstances of this case this exclusion is entirely unacceptable'. The purpose of the action is thus the annulment of the decision rejecting the applicant's candidature, notified to him by Dr Huguet. Furthermore, the applicant made it clear at the hearing, in response to a question put by the Court, that that was the true purpose of his action.

68 Accordingly, the claim for annulment must be taken to be directed against, first, Dr Huguet's letter of 16 July 1993 and, secondly, the decision announced in that letter to reject the applicant's candidature. It is therefore necessary to consider the admissibility of the action from both of those angles.

69 The claim for annulment must be dismissed as inadmissible in so far as it is directed against Dr Huguet's letter of 16 July 1993. First, that letter does not constitute an act adversely affecting the applicant. It is not from the authority officially empowered to take a decision on the applicant's candidature, that is to say the Director of ITER, who, under the fourth sentence of Article 8(2) of the cooperation agreement, is responsible for selecting, from among the qualified persons nominated by the parties, the members of the Joint Central Team other than the Deputy Directors. Nor does its author state that he is writing under delegated powers in the name and on behalf of that authority. The letter thus could not, by reason of the capacity of its author, objectively be considered to constitute a definitive decision of the competent administrative authority. It follows that the letter cannot affect

directly and immediately the applicant's position in law and under the Staff Regulations. Nor, moreover, would its annulment improve his legal position, since it would not affect the decision to reject the applicant's candidature.

70 In addition, even if the letter did amount to an act adversely affecting the applicant, the Court would not have jurisdiction to rule on it. The letter refers to the decision by the Director of ITER to select one of the qualified persons nominated by the parties, which, for the reasons set out above, falls outside the Court's jurisdiction.

71 The action is accordingly inadmissible in so far as it is intended to secure the annulment of the letter sent by Dr Huguet to the applicant on 16 July 1993.

72 In so far as the claim for annulment is directed at the decision, announced in the letter of 16 July 1993, to reject the applicant's candidature, it must be pointed out that it may have been rejected at one of two successive stages of the applicable procedure for making an appointment to the post at issue, that is to say either at the stage when the Director of ITER must select the person to hold the post from among the qualified persons nominated by the parties, or at the previous shortlisting stage when the Commission is required to gather together the candidatures from the Community and is responsible for nominating the qualified persons from among those candidates for consideration by the Director of ITER.

73 The application refers simultaneously to those two stages of the procedure and does not differentiate clearly between them, complaining in some places of a rejection by the Director of ITER (see, for example, paragraphs 30 and 36) and in others of one by the Commission before the candidatures were passed on to the Director of ITER (see, for example, paragraphs 28 and 32).

74 It is thus necessary to examine in turn those two hypotheses relating, respectively, to the selection and shortlisting procedures for candidates for the post at issue.

75 On the one hand, the action must be dismissed as inadmissible in so far as it is directed against the decision by the Director of ITER to reject the applicant's candidature.

76 Assuming that the letter advises the applicant of an act adversely affecting him, namely the decision by the Director of ITER not to accept his candidature from among those of the qualified persons nominated by the parties to take up the post, for the reasons set out above the Court lacks jurisdiction to rule on it.

77 Furthermore, the applicant's argument to the effect that the Commission may be held responsible for the decision to reject his candidature taken by the Director of ITER or the person delegated by him, on the basis both of its duty to have regard to his interests and of the alleged agreement that he reached in good faith with Dr Huguet, must be rejected in the context of this action for annulment. Whatever the merits of that argument, it cannot confer jurisdiction on the Court to annul a decision by an organ which is distinct from the Community.

78 On the other hand, the Court has jurisdiction in so far as the action is directed against an alleged decision by the Commission at the shortlisting stage not to pass the applicant's candidature on to the Director of ITER.

79 However, the burden of proving that the applicant's candidature was rejected by the Commission at the shortlisting stage, with the result that it was not passed on to the Director of ITER, rests with the applicant and that assertion remains unproved.

80 The Commission, replying, *inter alia*, to the question whether it had in this case passed on to ITER the list of all the persons who had lodged their candidature in competition COM/R5043/93, and in particular the applicant's candidature, confirms that it notified ITER of the latter. It states that it drew up an internal list of all the candidatures, including the applicant's. While that list was not passed on to ITER, the Commission informed Dr Rebut, the Director of ITER, of those candidatures orally. Dr Rebut then gave instructions for the candidatures to be discussed directly with Dr Huguet. The list of candidatures was therefore then discussed by Mr Maisonnier (on behalf of the Commission) and Dr Huguet (on behalf of ITER). Following those discussions Dr Huguet decided to interview, in March 1993, two of the candidates because they both had particular knowledge of Japan and spoke Japanese, namely Mrs Z., who had worked in Japan, and Mrs T., whose husband was Japanese. The Commission explains that Dr Huguet did not consider it necessary to hold a formal interview with the applicant because, as a result of his work with the applicant at JET, he was fully capable of assessing his abilities without having to hold such an interview. Dr Huguet selected Mrs Z. but she turned the post down and an American candidate was ultimately appointed. The Commission thus finally, on 22 November 1993, withdrew its vacancy notice.

81 In view of that information, the applicant has not been able to adduce a sufficiently coherent body of evidence to substantiate his arguments concerning an alleged decision taken by the Commission rejecting his candidature at the shortlisting stage and thus his assertion that his candidature was not passed on by the Commission to ITER.

82 Finally, the argument put forward by the applicant to explain the rejection of his candidature and the failure to pass it on, based on alleged animosity towards him on the part of Dr Rebut, the former Director of JET and the Director of ITER at the material time, is not well founded. Even if those assertions, which are disputed by the Commission, are true, they can at most support the proposition that the applicant was excluded by ITER, not by the Commission, since the Director of ITER plays a part only in the second phase of the procedure, after the Commission has drawn up a shortlist and then passed the candidatures on to ITER.

83 It has thus not been established that the Commission failed to transmit the applicant's candidature to ITER and that it thus took a decision rejecting it. The claim for annulment is therefore inadmissible in so far as it is directed against an alleged decision taken by the Commission to reject the applicant's candidature at the shortlisting stage.

84 It follows from all of the foregoing that the claim for annulment is inadmissible.

Admissibility of the claim for damages

85 The applicant claims, first, damages for the refusal to appoint him to the post in question and, secondly, damages for his allegedly being defamed. The Commission puts forward different pleas of inadmissibility against each claim.

1. Admissibility of the claim seeking damages for the refusal to appoint the applicant to the post in question

Arguments of the parties

86 The *Commission* points out that while the action for annulment and the action for damages are independent remedies (Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171), that principle is subject to an exception where the claim for damages is closely linked with an act adversely affecting the applicant which he has challenged.

87 It considers that the claim for damages, in so far as it is closely linked with the claim for annulment, which is inadmissible, is also inadmissible.

88 The *applicant* accepts that his claim for damages to compensate him for the harm caused by the appointment of a candidate other than him to the post in question is linked with his claim for annulment. However, since he takes the view that the claim for annulment is admissible, he considers that his claim for damages is similarly admissible.

Findings of the Court

89 Where there is a close link between a claim for annulment and a claim for damages, the inadmissibility of the claim for annulment entails the inadmissibility of the claim for damages (Case 4/67 *Muller* v *Commission* [1967] ECR 365; Case 346/87 *Bossi* v *Commission* [1989] ECR 303, paragraph 31; Case T-27/90 *Latham* v *Commission* [1991] ECR II-35, paragraphs 38, 39 and 40; *Moat* v *Commission*, cited above in paragraph 63, paragraph 46; Case T-82/91 *Latham* v *Commission* [1994] ECR-SC II-61, paragraphs 34, 35 and 36; and *Lopes* v *Court of Justice*, cited above in paragraph 63, paragraph 46).

90 In this case, as the applicant himself acknowledges, the claim seeking damages for the refusal to appoint him to the post at issue is closely linked to his claim for annulment. Its admissibility therefore depends on that of the claim for annulment. Since the latter is inadmissible, the same is true of the claim for damages.

91 It follows that the claim for damages to compensate the applicant for the refusal to appoint him to the post in question is inadmissible.

2. Admissibility of the claim seeking damages for the alleged defamation of the applicant

Arguments of the parties

92 The *Commission* points out that in his complaint the applicant claimed that he had been the victim of defamatory rumours and asked the Commission to take the

appropriate measures. It considers that there is no causal link between the alleged rumours and the subject-matter of the complaint, which sought the annulment of the decision of the Director of ITER to appoint another candidate to the post which the applicant had himself applied for. It notes that, in his application, the applicant stated that his claim in respect of defamation was independent from his claim for compensation for his not obtaining the post and argued that the Commission was responsible for the circulation of defamatory rumours about him.

93 The Commission submits that if the claim relating to the alleged defamation was independent from the applicant's challenge to the decision to select another candidate for the post in question, it should then be regarded not as a complaint but as a request within the meaning of Article 90(1) of the Staff Regulations. That request would be that the Commission open an investigation into the alleged rumours and take the necessary measures to defend the applicant's reputation, in accordance with its duty to have regard for the welfare of its staff. The action is premature in that case, since it was brought before the completion of the administrative procedure, and is therefore inadmissible.

94 The *applicant* considers that his claim for damages for defamation is based on specific grounds and should be distinguished from the claim for damages arising from his not having been appointed to the post in question.

95 He submits that this claim should therefore be declared admissible, whatever the fate of the other claim for damages.

96 He considers that he was not obliged to submit a request under Article 90(1) of the Staff Regulations. The Commission was fully aware of the arguments put forward by him to support his claim and had the opportunity to examine them in the context of his complaint. To oblige him to follow the pre-litigation procedure would mean unnecessarily prolonging the time which must elapse before he could expect a decision of the Court, without any hope that the Commission might change its position.

Findings of the Court

97 Articles 90 and 91 of the Staff Regulations lay down as a principle that the admissibility of actions brought by officials or other servants is conditional on the proper observance of the preliminary administrative procedure instituted by them. Those rules are mandatory and the parties may not waive them (*Whitehead* v *Commission*, cited above in paragraph 63, paragraphs 18 and 19, and Case T-182/94 *Marx Esser and Del Amo Martinez* v *Parliament* [1996] ECR-SC II-1197, paragraph 31).

98 It is only where there is a direct link between a claim for annulment and a claim for damages that the claim for damages is admissible as being ancillary to the claim for annulment without necessarily having to be preceded by a request to the appointing authority for compensation for the damage allegedly suffered and by a complaint challenging the implied or express rejection of the request. By contrast, where the alleged damage does not result from an act whose annulment is sought but from a series of wrongful acts and omissions alleged to have been committed by the administration, the pre-litigation procedure must necessarily commence with a request that the appointing authority make good that damage (Case T-500/93 *Y* v *Court of Justice* [1996] ECR-SC II-977, paragraph 66).

99 The applicant's claim for damages in respect of the harm caused by the defamatory rumours of which he was allegedly the victim is independent from the claim for annulment. It is therefore admissible only if it was preceded by the preliminary administrative procedure comprising a request under Article 90(1) of the Staff Regulations and then a complaint under Article 90(2). It is common ground that the applicant did not comply with that two-stage procedure. It follows that the claim for damages regarding the alleged defamatory rumours is inadmissible.

100 The action must therefore be dismissed as inadmissible in its entirety.

Costs

Arguments of the parties

101 The *applicant* asks that, whatever the Court's decision on his application, all the costs should be borne by the Commission.

102 He states on this point that, by its complete failure to deal adequately with his correspondence and his complaint, the Commission made it inevitable that the case would be brought before the Court. He notes in particular that in the preparation of the Commission's decision on his complaint no account was taken of the documents which he had sent to the Commission on 8 December 1993.

103 The *Commission* asks the Court to make an order for costs in accordance with Article 88 of the Rules of Procedure.

Findings of the Court

104 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that, without prejudice to the second subparagraph of Article 87(3), in proceedings between the Communities and their servants the institutions are to bear their own costs. In addition, under the first subparagraph of Article 87(3) the Court may, where the circumstances are exceptional, order that the costs be shared. In this case, however, the Court considers that there are no such exceptional circumstances.

105 While it is true that the letters sent by the applicant to the Commission on 9 June, 30 June and 2 August 1993 did not receive a written reply until 13 September 1993, that is to say after the complaint had been lodged, and that reply was supplemented by a piece of information given orally during the interservices meeting on

18 November 1993, those delays are not so excessive that the costs should, exceptionally, be shared.

106 The same conclusion must be reached with regard to the Commission's treatment of the applicant's letter of 8 December 1993 which he wished to be taken into account in the reply to his complaint being prepared by the Commission. Since the Commission was required, under the second subparagraph of Article 90(2) of the Staff Regulations, to notify the applicant of its reasoned decision within four months from the date on which the complaint had been lodged and the applicant's letter had been sent at the end of the third month of that period, the failure by the Commission to take account of the letter in view of the fact that the decision on the complaint was soon to be drawn up, as the applicant was moreover duly informed by letter of 15 December 1993, does not appear to be so clearly unjustifiable that the costs should, exceptionally, be shared.

107 The parties must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action as inadmissible;

2. Orders the parties to bear their own costs.

Azizi García-Valdecasas Jaeger

Delivered in open court in Luxembourg on 12 May 1998.

H. Jung
Registrar

J. Azizi
President